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In The Supreme Court of the United States

OCTOBER TERM, 1973

Case No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY, etc.,

Appellant,

vs.

PAT L. TORNILLO, JR.,

Appellee.

On Appeal from the Supreme Court of Florida

AMICUS CURIAE BRIEF FOR FLORIDA PUBLISHING COMPANY

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INTEREST OF AMICUS CURIAE

This brief is filed by counsel for Florida Publishing Company, as Amicus Curiae, pursuant to Supreme Court Rule 42. Written consents of Appellant and Appellee therefor have been filed with the Clerk.

The Florida Publishing Company publishes the daily newspapers in Jacksonville and St. Augustine, Florida – The Florida Times-Union, Jacksonville Journal, and The St. Augustine Record, as well as weekly and semi-weekly newspapers elsewhere in North Florida. The Publishing Company has, therefore, a direct interest in the validity vel non of the so-called Florida Right To Reply Statute – F.S. 104.38. It filed an amicus curiae brief in the Supreme Court of Florida asserting the unconstitutionality of that vague and infirm statute.

It is difficult, if not impossible, for the press to function properly in the heat of a political campaign with the sanctions of that statute hanging over it. Accordingly, the Publishing Company files this brief setting up its position. Just as the lower courts in Volusia and Dade Counties, and the Florida Attorney General, found the statute unconstitutional, so we think this Court should hold.

STATEMENT OF THE CASE

Amicus Curiae adopts Appellant's Statement of the Case.

QUESTIONS PRESENTED FOR REVIEW

A. The Florida Statute (F.S. 104.38) which requires the press to publish a reply as a condition to publishing matter critical of political candidates violates the First Amendment.

B. The Florida Statute is unconstitutionally vague and ambiguous.

ARGUMENT

A. Violation of First Amendment.

The statute here (F.S. 104.38), in vague and ambiguous terms, seeks to require a newspaper (if it has published an article objectionable to a candidate for office) to *"immediately* publish free of cost *any* reply he (the candidate) may make thereto." A criminal penalty is imposed for violation.

There has been one Florida First Amendment newspaper case before this Court since *New York Times*, i.e., *Ocala Star-Banner v. Damron* (1971) 401 U.S. 295. And, just as in *Ocala Star Banner*, the decision of the Florida Appellate Court is in violation of the First Amendment guarantees.

There can be no freedom of speech or of the press if the Legislature can decree just what the press shall or shall not publish. The issue here is just that simple.

If the press has hanging over it the threat that every time it publishes anything about a political candidate, it must, in turn, regardless of the truth, merits or demerits of the candidate's position, publish immediately "any reply" the candidate desires, that makes a mockery of freedom of the press.

News Room Argument

As we stated (in news room language) in our amicus curiae brief in the Supreme Court of Florida:

"(1) Individuals or groups seeking to use the 'equal space' requirements of this ruling can create a form of prior restraint by their mere eligibility to use such powers.

"(2) Persons responding to alleged 'assaults' stemming from political campaign pronouncements could cause newspapers

to print material that could be inaccurate at best and libelous at worst due to the vagueness permitted by this statute in replying to such initial stories.

"(3) Nowhere in the *Tornillo* ruling is there provision for requiring accuracy in such replies or for filing such replies in such time and manner as to give the newspaper the opportunity to verify the contents of such reply.

"(4) If this ruling's 'logic' is carried to its ultimate conclusion, the risk as well as the effort involved in handling such replies could cause newspapers to abandon any efforts to cover comprehensively and intelligently any political campaigns. If one primary candidate with four opponents made a statement attacking the others, a newspaper reporting this statement could find itself with four replies, all of which by this ruling would have to be presented using the same size type and the same space. This could create a situation in which the newspaper would find it impossible to follow the law, thus opening itself to further action.

"(5) Should press coverage of election campaigns, which is part and parcel of our history and our heritage, be thus restricted, the damage done to freedom of the press would be exceeded only by the damage done to the equally historic right of the public to know of the workings of its chosen form of government.

"(6) Should this occur, it would be the first step in regulation of the press in contravention of the First Amendment of the Constitution of the United States. With election campaign coverage thus regulated, it would be only a matter of time until all content of newspapers was similarly regulated.

"(7) Under the Florida Supreme Court *Tornillo* opinion, page 11, the obligation and burden to determine, at one's

peril subject to possible jail sentence, whether the reply is 'wholly responsive' to the charge, and whether such reply is 'neither libelous nor slanderous of the publication nor any one else, nor vulgar nor profane' is unconstitutionally vague and general, and, for practical purposes, not possible to meet. A full factual investigation and legal research and opinion would be required in each case.

"(8) It is essential for the people to know what goes on, particularly in the political field. But if every time a news story is published on a political matter the newspaper has to worry about a law suit or a criminal charge, much news will not be published and the public will be deprived of its right to know."

Florida Statute Invalid

The New York Times and Washington Post may freely publish the stolen Pentagon documents (see dissent of Chief Justice Burger in *New York Times v. United States* (1971) 403 U.S. 713, at 748-752). Yet Florida newspapers are *compelled* to publish immediately any reply an irritated *candidate*[1] submits, under the ruling here.

Mr. Justice Boyd, in his dissent below, ably states what the Florida Supreme Court should have held. We quote:

> "The statute is so vague on its face as to raise doubts in the minds of those reading it as to the exact underlying legislative intent.
>
> "There are no standards as to when a publisher must carry a reply. * * * *

Note 1: The statute applies only to candidates. Once the candidate is elected, the statute does not apply! It may apply, however, to an officer running for re-election.

* * * * * * *

"The First Amendment to the Constitution of the United States provides that, 'Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .' Article I, Section 4 of the Constitution of the State of Florida similarly provides: 'No law shall be passed to restrain or abridge the liberty of speech or of the press.' Since these constitutional provisions prohibit the government from limiting the right of the publishing press to publish news and comment editorially, it would be equally unconstitutional for the government to compel a publisher to print a statement of any person, or persons, against that publisher's will.

"The majority opinion correctly observes that freedom of speech and freedom of the press carry the duty to speak the truth. And, of course, the constitutional rights of freedom of speech and freedom of the press must be exercised with appropriate regard to the provisions of our libel and obscenity statutes. As in all other areas of public and private service, some errors will, from time to time, surely occur. Yet, recognizing that the survival of a free press is contingent upon the press fulfilling its duty to the general public, the overwhelming majority of those in the publishing press comply with the highest of ethical standards.

"We are taught in the Bible that, 'the truth will make you free.' John 8:32.

"Free people can make proper decisions for their own self-government only when they are adequately informed by a free press. To the extent that government limits or adds to that which a publisher must

distribute, freedom of speech and freedom of the press are thereby diminished.

"Almost everyone whose name has been carried frequently in the news media has been offended, at one time or another, by stories or comments with which he disagrees. This is part of the price one pays for success and notoriety. If there exists a problem in this state of affairs, the muzzling of a free press is not the solution to such problem."

Florida Retraction Statute

The Supreme Court of Florida attempts to justify its holding in *Tornillo* by reference to the Florida Retraction Statute – F.S. 770.02. Yet this Court has flatly held that the principles of the First Amendment are not affected by retraction or failure to retract. In *New York Times v. Sullivan* (1964) 376 U.S. 254, at 286, this Court said:

"The Times' failure to retract upon Respondent's demand, although it later retracted upon the demand of Governor Patterson, is likewise not adequate evidence of malice for constitutional purposes."

This ruling has been followed in *New York Times v .Connor* (CA-5, 1966) 365 F.2d. 567, 577, and *United Medical v. Columbia Broadcasting* (CA-9, 1968) 404 F.2d. 706, 713.

Moreover, F.S. 104.38 attempts to *dictate* what a newspaper *must* print – completely different from a retraction statute such as F.S. 770.02.

B. Vague and Ambiguous.

A mere reading of F.S. 104.38, as adequately argued elsewhere, demonstrates the complete invalidity of the statute because of its vagueness and ambiguity. We respectfully refer to the dissenting opinion below, and to the Appellant's brief.

The Supreme Court of Florida may not cure all this lack of standards by a complete *rewrite* of the statute. That is a legislative function – not a judicial one. This is no place for such "judicial activism."

CONCLUSION

The 1913 Florida Right to Reply Statute was "dead" for 60 years until it was re-activated by the Florida Supreme Court in 1973. It should now be put to permanent rest as unconstitutional and void.

Respectfully submitted,

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January, 1974.

CERTIFICATE OF SERVICE

I CERTIFY that I have this January 18, mailed three copies of the foregoing Amicus Curiae Brief to Messrs. Daniel P. S. Paul and James W. Beasley, Jr., 1300 First National Bank Building, Miami, Florida 33131, and Messrs. Cohn & Marks, 1920 L Street, N. W., Washington, D. C. 20036, attorneys for Appellant; and to Tobias Simon, Esquire, 1492 South Miami Avenue, Miami, Florida 33130, attorney for the Appellee. I have also mailed copies to counsel for Amici Curiae as follows:

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